



DATA PROTECTION UNDER ICAO ANNEX 13 -- A PROPOSAL

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Accident Analysis Committee**

International Federation of Air Line Pilots' Associations

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AIG 99

- **ICAO Convenes working meetings periodically to review and amend the ICAO Annexes**
- **Annex 13, Accident and Incident Investigation and Prevention, will be reviewed in September, 1999 in Montreal**



IFALPA Involvement

- IFALPA is a federation of pilot associations worldwide representing over 100,000 commercial pilots
- IFALPA is an accredited observer to ICAO
- IFALPA will participate in AIG 99 but will not have a vote





Annex 13

- **Accident and Incident Investigation**
- **Chapter 5 deals with the conduct of the investigation of an aircraft accident or incident by the investigating State**
- **It sets out duties, responsibilities and rights for the various involved States**
- **Paragraph 5.12 deals with disclosure of records obtained in the investigation**



Paragraph 5.12

- “ The State conducting the investigation of an accident or incident, wherever it occurred, shall not make the following records available for purposes other than accident or incident investigation, unless the appropriate authority for the administration of justice in that State determines that...



Paragraph 5.12

- ...their disclosure outweighs the adverse domestic and international impact such action may have on that or any future investigations:
- a) All statements taken from persons by the investigating authorities in the course of the investigation;



Paragraph 5.12

- **b) All communications between persons having been involved in the operation of the aircraft;**
- **c) Medical or private information regarding persons involved in the accident or incident;**
- **d) Cockpit voice recordings and transcripts from such recordings; and**



Paragraph 5.12

- e) **Opinions expressed in the analysis of information, including flight recorder information.**
- **These records shall be included in the final report or it's appendices only when pertinent to the analysis of the accident or incident. Parts of the records not relevant to the analysis shall not be disclosed."**



AIG 92

- **Montreal, February, 1992**
- **Amended Para 5.12 among others**
- **The protective language was contained in non binding Attachment D to Annex 13.**
- **protective language was moved from Attachment D to Para 5.12 in response to the fact that data was being misused, causing fear of future unavailability or non cooperation**



AIG 92

- “ICAO and the states which agreed to [Para 5.12 and Attachment D] are clearly of the view that the availability of accident investigation material to the courts jeopardizes air safety” Safety or Evidence? Confidentiality of Aircraft accident Investigation Information. T. Pyne, undated



Application of 5.12

- **New Zealand Litigation**
- **DHC 8 ZK -NEY at Palmerston North**
- **Use of the CVR tape in the prosecution of the operating crew by the police**
- **Court of Appeal of New Zealand view**



Court of Appeal

- ‘ So far as paragraph 5.12 is concerned, we note
- its very limited binding force.....
- its relative unimportance.....
- its indeterminate character.....
- the recognition in annex 13 that police and related investigations may be running in parallel.....’ *New Zealand ALPA v The Attorney General, et al. CA 300/96 at 31*



Court of Appeal

- Discussing implementation of paragraph 5.12, the Court noted that “...when provisions regulate, rather than prohibit, the use of information...courts are authorised to make decisions in particular contexts....such a [decision] cannot sensibly be undertaken at the stage of the issue of a search warrant.” Id. at 35



Where Are We?

- **The Police have the right to obtain a search warrant for the CVR, and presumably any other document which is part of the investigation to support a criminal prosecution.**
- **Civil discovery also seems wide open to “fishing expeditions”**



Where Are We?

- The Appeals Court specifically reserved the question of admissibility at trial as not before it. The Court did note without enthusiasm that the balancing test which is contained in paragraph 5.12 seemingly would have to be applied prior to admission of such evidence.



Where Are We?

- This is small comfort to flight crews
- Evidence which is created by invasion of privacy (CVR or CVVR) or voluntarily given (immediate post event statement) may ultimately be admissible against the crewmember in criminal, regulatory or discipline proceedings, depending on the Judge.



You are the Attorney for the Crew

- How do you advise?
- What kind of statement?
- What to say on the CVR?
- What to do with the CVVR (cockpit view video recorder!)
- What would the Medical Societies say?



Some History

- CVR use was first required in the U.S. in 1965. 14 CFR sec. 121.358f
- USALPA has stated in Congressional testimony that: "...At the time it was recognized by all interested parties that CVRs were an unprecedented intrusion into the workplace and an invasion of personal privacy.



Some History

However, these concerns were outweighed by the need for information from the flight crew in order to determine the cause of the accident so future occurrences could be prevented.”

Statement of Captain H. Duffy, President
USALPA, before the Aviation Subcommittee,
U.S. Senate, May 10, 1990



Where are we Now?

- **Open Season on CVRs**
- **Cannot perform a pilots job without 100% recording**
- **Forced Self Incrimination?**
- **Local Law applies to International Crew**
- **Criminal Liability without Intent**



CVVR

- Investigators see need to record CRT images presented to pilots via flight deck video recording
- IFALPA agrees with need
- Pilots will have none of it based upon CVR track record
- Can you blame them?



CVR

- **Pilot Associations will have to warn that anything you say on the flight deck can and will be used against you in many countries.**
- **The CVR is required for flight, but can be rendered harmless in contravention of the regulations.**



STATEMENTS

- **Anything you say can be used against you.**
- **What will pilots reasonably be expected to comment on?**
- **What would you say?**
- **Can this be good for accident investigation?**



FOQA/ASAP

- **FOQA - Flight Operations Quality Assurance - Flight recorder monitoring of routine operations**
- **ASAP - Aviation Safety Action Program - Voluntary self disclosure reporting**
- **Pilots must believe in the integrity of the confidential non punitive nature of these programs**



Air Safety

- To fix something, it must be shown to be broken.
- This demonstration is principally done by proper accident investigation
- 70% of accidents are at least partially caused by crew action or inaction
- Can we afford to give up most of the hard data in this area?



Attachment D

- **Pre AIG 92**
- **“ Information given voluntarily by persons responsible for the safe operation of the aircraft, in the course of accident and incident investigations, is presently inadequately protected and may be used for subsequent disciplinary, civil, administrative and criminal proceedings.**



Attachment D

- If this information is distributed, there is a possibility that it will no longer be openly disclosed to investigators. Lack of access to this information would impede the investigative process and seriously affect flight safety.”



IMMUNITY?

- **NO**
- **If a crew is criminally negligent, they should be prosecuted.**
- **The question is one of availability of the compulsory CVR/CVVR or voluntary statement for the investigation or prosecution of the matter**



CIVIL DISCOVERY

- **NOT A PROHIBITION**
- **Limitation on publication in media**
- **Typically through a protective order**
- **Must make showing of need for tape v transcript v paraphrased summary**



PROPOSAL

- **5.12 The State conducting the investigation of an accident or incident shall not make the following information available for purposes other than accident or incident information, unless the appropriate authority for the administration of justice in that State determines that accident or incident investigation or accident prevention efforts will not be adversely affected by disclosure.**



PROPOSAL

- a) All communications between persons having been involved in the operation of the aircraft
- b) Medical or private information regarding persons involved in the accident or incident
- c) Products of any voluntary data collection program for accident prevention purposes
- d) Opinions expressed in the analysis of information, including flight recorder information



PROPOSAL

- **This information shall be included in the final report or its appendices only when pertinent to the analysis of the accident or incident. Parts of the records not relevant to the analysis shall not be disclosed**



PROPOSAL

- **5.12.1 The State conducting the investigation of an accident or incident shall not allow the public dissemination of the following information, nor shall such information be used adversely against the individual providing it. Any use of such information by the appropriate authority for the administration of justice in the State shall comply with these limitations.**



PROPOSAL

- a) All statements voluntarily given by persons to accident or incident investigation authorities;
- b) Cockpit voice recordings and transcripts from such recordings; and
- c) Cockpit view video recordings and representations from such recordings.



PROPOSAL

- **This information shall not be included in the final report or its appendices. The information may be paraphrased or characterized for inclusion in the final report or its appendices if it is necessary for the analysis of the accident or incident.**



PROPOSAL

- **NOTE : Information given voluntarily by persons responsible for the safe operation of the aircraft, in the course of accident and incident investigations, is presently inadequately protected and may be used for subsequent disciplinary, civil, administrative and criminal proceedings.**



PROPOSAL

- If this information is distributed, there is a possibility that it will no longer be openly disclosed to investigators. Lack of access to this information would impede the investigative process and seriously affect flight safety.



**THIS IS A WORKING
DRAFT**

**Your Comments would be Valued
THANK YOU**

